Admissibility of business and public records after *Crawford* — Revised 12/2009

Rule 803, Ariz.R.Evid., lists certain evidence that is not excluded by the hearsay rule, regardless of the availability of the declarant. This includes Rule 803(6), records of regularly conducted activity; Rule 803(8), public records and reports; and Rule 803(10), absence of public record or entry. However, a record admissible under a hearsay exception may be considered testimonial and precluded by *Crawford v. Washington*, 541 U.S. 36 (2004). The court held in *Crawford*:

> Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does [*Ohio v.*] *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

Id. at 68. In discussing historical exceptions to the hearsay rule, the court noted, "Most of the hearsay exceptions covered statements that by their nature were not testimonial — for example, business records or statements in furtherance of a conspiracy." *Id.* at 56.

The Court later clarified that "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because — having been created for the administration of an

entity's affairs and not for the purpose of establishing or proving some fact at trial — they are not testimonial." *Melendez-Diaz v. Massachusetts*, --- U.S. ---, 129 S.Ct. 2527, 2539-2540 (June 25, 2009).

But the court also referred to a "core class of 'testimonial' statements" that included affidavits and other materials prepared in expectation of trial. *Crawford,* 541 U.S. at 51. This category includes business records prepared in expectation of litigation, *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477 (1943), and records of chemical analyses. *Melendez-Diaz*, --- U.S. at ---, 129 S.Ct. at 2532. A key factor in whether a record is testimonial is whether the circumstances of the statement (or creation of the record) "would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id*., quoting *Crawford*.

Several courts have since addressed whether business and public records are still admissible after *Crawford.* Although the courts have not ruled consistently, they have tended to hold that routine objective records are nontestimonial and are therefore admissible. For example, "[d]ocuments prepared in the regular course of equipment maintenance may well qualify as nontestimonial records." *Id*., n.1.

In *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 183, 129 P.3d 471, 472 (App. 2006), the court held that maintenance and calibration records for the Intoxilyzer 5000 "do not fall within the purview of *Crawford* and are admissible under the public records and business records exceptions to the hearsay rule." The court noted that police criminalists kept such records in the ordinary course of business pursuant to statute. "Although the breath-testing machines are calibrated by criminalists employed by TPD [Tucson Police Department], that fact alone is not sufficient to estab-

lish bias or inherent untrustworthiness." *Id.* at 187, 129 P.3d at 476. The court found that a majority of courts that have addressed the admissibility of similar quality assurance records have determined they were nontestimonial:

> We are persuaded by the reasoning of other courts that, because the maintenance records contain factual memorializations generated by a scientific machine, . . . and the records are prepared by technicians who are not proxies of police investigators and "have no demonstrable interest in whether the certifications produce evidence that is favorable or adverse to a particular defendant," . . . the records do not lack trustworthiness. That the calibration records contain no opinion by the technicians further supports the conclusion that they are trustworthy. . . .
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> We conclude that the QARs qualify as business records under Rule 803(6). . . . [W]hen a public agent keeps records in the ordinary course of business of his or her employer, the records may still constitute business records. . . .

Id. at 187-188. The fact that the records were created with the understanding that they may be used in court did not render them testimonial. *Id.* at 190, 129 P.3d at 479.

Courts in other jurisdictions have held that various types of certifications and lab reports are still admissible after *Crawford*. In *People v. Johnson*, 121 Cal.App.4th 1409, 18 Cal.Rptr.3d 230 (2004), the court found that a county crime lab's drug analysis was not testimonial. "A laboratory report does not 'bear testimony,' or function as the equivalent of in-court testimony." *Id.* at 1412, 18 Cal.Rptr.3d at 233. In *State v. Cao*, 175 N.C.App 434, 626 S.E.2d 301 (2006), the court found that the weight of drugs specified in a laboratory report would likely qualify as an "objective fact obtained through a mechanical means," which the court determined was necessary to admit such a report. "[W]e hold that laboratory reports or notes of a laboratory technician prepared for use in a criminal prosecution are nontestimonial

business records only when the testing is mechanical, as with the Breathalzyer test, and the information contained in the documents are objective facts not involving opinions or conclusions drawn by the analyst." *Id.* at 440, 626 S.E.2d at 305.

In *State v. Dedman*, 136 N.M. 561, 102 P.3d 628 (2004), the court held that a blood alcohol report prepared by the Scientific Laboratory Division of the Department of Health was nontestimonial so that the nurse who drew the blood did not have to testify. (The forensic toxicologist who performed the test did testify.) The court stated that the report was neither investigative nor prosecutorial and was admissible under the public record hearsay exception. The court then looked at whether there was a violation of defendant's right of confrontation:

> [A] blood alcohol report is generated by SLD personnel, not law enforcement, and the report is not investigative or prosecutorial. Although the report is prepared for trial, the process is routine, non-adversarial, and made to ensure an accurate measurement. While a government officer prepared the report, she is not producing testimony for trial. Finally, a blood alcohol report is very different from the other examples of testimonial hearsay evidence: "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." *Crawford*, 124 S.Ct. at 1374. We conclude that the blood alcohol report is not testimonial evidence.

Id. at 569, 102 P.3d at 636. However, in *People v. Rogers*, 8 A.D.3d 888, 780 N.Y.S.2d 393 (2004), the court held that a report giving the results of testing on the victim's blood was improperly admitted as a business record. The report was prepared by a private lab at the request of law enforcement and therefore lacked the indicia of reliability necessary to invoke the business records exception:

> Defendant's 6th Amendment right to cross-examine witnesses was violated by admission of the blood test report. Defendant had the right to cross-examine witnesses regarding the authenticity of the sample for foundation purposes. He also had the right,

> pursuant to the Confrontation Clause, to cross-examine regarding the testing methodology (*see* U.S. Const. 6th Amend; *Crawford v. Washington*. . .). Because the test was initiated by the prosecution and generated by the desire to discover evidence against defendant, the results were testimonial (*see Crawford v. Washington, supra*). The test result established the victim's blood alcohol content at the time the blood was drawn and was the basis of expert testimony extrapolating her blood alcohol content at the time of the alleged rape. This was especially significant here, as the victim's intoxication level directly related to her capability to consent. Admission of the blood test results without the ability to cross-examine the report's preparer was a violation of defendant's rights under the 6th Amendment's Confrontation Clause, which we cannot deem harmless. . . .

Id. at 891, 780 N.Y.S.2d at 397.

In *City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203 (Nev. 2005), a statute permitted the admission of a nurse's affidavit to prove certain facts relating to withdrawal of blood for testing in DUI cases. The court found that although the affidavits "may document standard procedures, they are made for use at a later trial or legal proceeding. Thus, their admission, in lieu of live testimony, would violate the Confrontation Clause." *Id.* at 906, 124 P.3d at 205. However, the statute also stated that the witness could be ordered to testify if the defendant followed certain procedures to object to admission of the affidavit. The court determined that those provisions adequately protected the defendant's rights.

Courts that have addressed autopsy reports have generally found them nontestimonial under *Crawford* if the reports contained objective information. In *State v. Lackey*, 280 Kan. 190, 213, 120 P.3d 332, 351-352 (2005), *overruled on other grounds by State v. Davis,* 283 Kan. 569 (2006), the court held that an autopsy report by a doctor who later died was admissible as a business or official record:

> [F]actual, routine, descriptive, and nonanalytical findings made in an autopsy report are nontestimonial and may be admitted without the testimony of the medical examiner. In contrast, contested opinions, speculations, and conclusions drawn from the objective findings in the report are testimonial and are subject to the Sixth Amendment right of cross-examination set forth in *Crawford*. Such testimonial opinions and conclusions should be redacted in the event that the medical examiner is unavailable.

Likewise, in *Rollins v. State*, 392 Md. 455, 497, 897 A.2d 821, 845-846 (2006), the court held:

> Although an autopsy report may be classified as both a business and a public record, it is the contents of the autopsy report that must be scrutinized in order to determine the propriety of its admission into evidence without the testimony of its preparer. If the autopsy report contains only findings about the physical condition of the decedent that may be fairly characterized as routine, descriptive and not analytical, and those findings are generally reliable and are afforded an indicum of reliability, the report may be admitted into evidence without the testimony of its preparer, and without violating the Confrontation Clause. If the autopsy report contains statements which can be categorized as contested opinions or conclusions, or are central to the determination of the defendant's guilt, they are testimonial and trigger the protections of the Confrontation Clause, requiring both the unavailability of the witness and prior opportunity for cross-examination.

In *Smith v. State*, 898 So.2d 907, 916 (Ala.Crim.App. 2004), the court stated that an autopsy report is a business record and not testimonial. However, the court stated that in this particular case, it was error (although harmless) for one pathologist to testify about another pathologist's autopsy report, because the state would have been proving an essential element of its case — that the victim died of asphyxiation — by hearsay evidence alone. In another case decided the same day, the court stated: "Unlike the hearsay in *Crawford v. Washington*, the hearsay at issue in this case is nontestimonial in nature — an autopsy report on the victim. . . . The results of Dr. Embry's autopsy and the supporting materials are business records, which

bear the earmark of reliability. . . ." *Perkins v. State*, 897 So.2d 457, 464 (Ala.Crim.App. 2004).

Other types of routine records have been found admissible:

> Records of prior convictions are public records, which are created and maintained regardless of possible future criminal activity by the defendants . . . [T]he records merely document facts already established through the judicial process. Thus, the individuals entering the information in the records cannot be considered witnesses against the subject of the records and their statements are not testimonial.

State v. King, 213 Ariz. 632, 638, 146 P.3d 1274, 1280 (App. 2006); *see also State v. Bennett*, 216 Ariz. 15, 17, 162 P.3d 654, 656 (App. 2007).

Fingerprint cards were considered nontestimonial in *State v. Windley*, 617 S.E.2d 682 (N.C.App. 2005). An officer there compared fingerprints found at a crime scene to prints in the Automated Fingerprint Identification System. When the prints matched defendant's, the officer compared the scene prints to the actual fingerprint card. He testified that the cards were kept in the normal course of business in the police record files. Defendant objected to admission of the card as a business record, arguing that the police officer who made it had to testify. The court found no error. "Notably, the *Crawford* Court indicated that business records are nontestimonial. . . . In the instant case, we conclude the fingerprint card created upon defendant's arrest and contained in the AFIS database was a business record and therefore nontestimonial." *Id.* at 686.

MVD Records are nontestimonial, because they are required by statute to be kept as a regular course of business. *State v. King*, 213 Ariz. 632, 638, 146 P.3d 1274, 1279. Driving records "are akin to business records, and are prepared and maintained regardless of their possible use in a criminal prosecution," leading to the

court's conclusion that "they are not testimonial under *Crawford." Id.* Likewise, a certification of the absence of a driver's license was admissible as a self-authenticating document and is nontestimonial in nature. *State v. N.M.K.*, 129 Wash.App. 155, 161, 118 P.3d 368, 372 (2005).

An affidavit certifying as to the absence of records was considered nontestimonial in *United States v. Rueda-Rivera*, 396 F.3d 678 (5th Cir. 2005). The government there sought to admit a Certificate of Nonexistence of Record ("CNR") as evidence that defendant had re-entered the United States after removal without having obtained the consent of the Attorney General or Secretary of Homeland Security. The CNR was signed by the Chief of the Records Services Branch of the Immigration and Naturalization Service, and stated that after a diligent search of the records, no evidence was found granting permission for admission after deportation. The affidavit was admitted through testimony of a Border Patrol agent. Defendant argued on appeal that *Crawford* applied, but the court disagreed. It noted that in an earlier unpublished opinion, it had likened an immigration file to business records and had concluded that such evidence was not testimonial. The court adopted that reasoning here: "The CNR admitted into evidence in this case, reflecting the absence of a record that Rueda-Rivera had received consent to re-enter the United States, does not fall into the specific categories of testimonial statements referred to in *Crawford*. We decline to extend *Crawford* to reach such a document." *Id.* at 680. *See also United States v. Cervantes-Flores*, 421 F.3d 825, 833 (9th Cir. 2005) ("The CNR certifies the nonexistence of a record within a class of records that themselves existed prior to the litigation, much like business records.").

In *Michels v. Commonwealth*, 47 Va.App. 461, 624 S.E.2d 675 (2006), a detective asked the Delaware Secretary of State to certify as to the nonexistence of two companies. The court concluded that these documents were nontestimonial:

> The documents certified by the Delaware Secretary of State are not testimonial for two primary reasons. First, the certificates are not by their nature accusatory and do not describe any criminal wrongdoing of appellant. Rather, they are a neutral repository of information that reflects the objective results of a search of public records. In addition, the documents do not resemble *ex parte* examinations, "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50, 124 S.Ct. at 1363. *Crawford* emphasized that a principal aim of the Confrontation Clause is to protect a criminal defendant from accusations of criminal wrongdoing. . . . The certificates prepared by the Delaware Secretary of State cannot be categorized as accusing appellant of a crime.

Id. at 469-470, 624 S.E.2d at 680. The court noted that while the certificates were requested by a law enforcement officer, they were prepared in a non-adversarial setting.